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In the Supreme Court
of the United States

OCTOBER TERM, 1975

No. 75-1166

COLUMBIA STEAMSHIP COMPANY, INC., a corporation,

Petitioner,

v.

AMERICAN MAIL LINE, LTD., STATES STEAMSHIP COMPANY, PACIFIC FAR EAST LINE, INC., AMERICAN PRESIDENT LINES, LTD., LYKES BROS. STEAMSHIP CO., INC., and AMERICAN EXPORT ISBRANDTSEN LINES, INC.,

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

In view of the Respondents' broadside attack upon both the procedure employed to bring this matter to the attention of the Court and the merits of the underlying claims, a brief reply is in order.

ARGUMENT

A.

Petition is Timely

Respondents contend that the Petition for a Writ of Certiorari was not timely filed. More particularly

they contend that the failure to petition within ninety (90) days of entry of a docket notation on January 16, 1975, by the Court of Appeals, precludes review by this Court. This contention is unfounded.

On January 16, 1975, the Court of Appeals entered an opinion which stated in pertinent part:

> ". . . We affirm but stay the mandate until there has been a final disposition of the appeal from the judgment in the consolidated civil actions 1576-72, *American Maritime Association* v. *Peterson, Secretary of Commerce,* and 1667-72, *States Marine International* v. *Paterson, Secretary of Commerce,* rendered by the United States District Court for the District of Columbia. Should the district court's judgment ultimately be affirmed, the mandate shall be issued forthwith. Should the district court's judgment ultimately not be affirmed, the mandate shall not be issued and the plaintiff's complaints will be reconsidered in light of the reasoning supporting the refusal to affirm." (App. A3)[1]

The procedure employed by the Court of Appeals was unique. There is no reported case in which a similar procedure has been utilized. The question is, of course, whether this opinion constitutes a "final" judgment against which petitioner's right to petition for certiorari accrues.

This is not an instance where a latent power of a court to revise or modify a judgment is involved. Rather the Court expressly reserved final determina-

[1] The reference to Appendix is to Petitioner's Petition for a Writ of Certiorari.

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tion until the Court of Appeals for the District of Columbia ruled on a similar case. Finality was not simply conditioned upon the passage of time, as was involved in *Market Street Rail Co.* v. *Railroad Commissioner*, 324 U.S. 548 (1945), but rather upon independent review by another tribunal.

Certainly the Court of Appeals for the Ninth Circuit could not have contemplated the necessity of petitioner filing a protective petition for certiorari and possibly briefs upon the merits, with all of the expense necessarily attendant thereon, while it *expressly* reserved the right, with no time limitations specified, to enter a completely different judgment. It is respectfully submitted that finality did not attach to the judgment until the Ninth Circuit ruled upon the effect, if any, of the companion litigation.

Respondents contend that this is a judgment coupled with a condition subsequent and that therefore finality attached when the opinion was rendered because the condition subsequent failed to occur. Even if this Court adopted the "condition subsequent" analysis, the procedural facts do not permit its application. The United States Court of Appeals in the District of Columbia reversed the trial court decision and reinstated the findings and conclusions of the Maritime Subsidy Board. The condition subsequent having occurred, the Ninth Circuit's judgment could not have become final until November 18, 1975, the date when it directed the mandate to issue.

In summary, whether the issue is analyzed as in-

volving the definition of "finality" or under the theory of "condition subsequent," filing of the Petition was timely.

B.

Petitioner Has Waived No Claims For Relief

Respondents contend that petitioner has waived any claim for recovery because it does not expressly seek relief with respect to either § 810 of the Merchant Marine Act or § 2 of the Sherman Act. This contention is unfounded.

The Ninth Circuit held that Petitioner lacked a remedy under either the Sherman Act or under § 810 of the Merchant Marine Act of 1936. The underpinning for both determinations was a finding that ". . . vessels transporting preference cargo are entitled to operating differential subsidies. . . ." (A11). If this Court determines that granting of operating differential subsidy for carriage of preference cargo transgresses the Merchant Marine Act of 1936, the case should then be remanded to the Court of Appeals for the Ninth Circuit to reconsider its ruling with that fact in mind.

C.

Grounds for Certiorari Exist

Respondents misrepresent petitioner's contention with respect to the grounds it contends exist for grant of certiorari. Petitioner has made no claim that a con-

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flict exists between lower court decisions.[2] Nor has it claimed that the decision of the Ninth Circuit was in conflict with any decision of this Court. It does contend that the decision has substantial national importance.[3]

At stake in this litigation is the question of whether an important segment of the Merchant Marine will survive. The effect of the respondents' use of operating differential subsidy to underwrite beneath-cost bids for carriage of preference cargo has been to destroy petitioner as a competitor and to injure or destroy other unsubsidized operators. The effects are not confined to petitioner but extend broadly to all other unsubsidized operators who are similarly situated. It further affects the military and economic stability of the country to the extent that its underpinnings are shored by the Merchant Marine. Can it thus be said, as respondents contend, that there is no major question of general applicability involved?

D.

The Merits

Respondents briefly summarize petitioner's contentions with respect to the merits and then supply a form of statutory response. The fallacies of their arguments can be briefly set forth:

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[2] Indeed, how could there be a conflict when the same judge sat by designation upon the panels of the only courts to consider the issue?

[3] See Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, pp. 7-8.

1. 1936 Act.

(a) The Merchant Marine Act, 1936, defines the necessity that subsidy be designed to meet foreign flag competition. Respondents argue that the statutory reference to "vessels", "services", "route", or "line" supports the contention that the nature or type of cargo carried by a subsidized vessel is immaterial. If the nature of cargo carried were immaterial, then presumably subsidized vessels could carry one hundred percent (100%) preference cargo and never seek to carry the "commercial cargoes" which they were losing to foreign flag ships when the Act was passed. If it were intended by Congress that subsidized vessels could carry exclusively preference cargo, there would have been no purpose in enacting an operating differential subsidy. Further, the Maritime Subsidy Board would not have determined that future subsidy should be reduced, on a sliding scale, when more than fifty percent (50%) of freight revenues were derived from preference cargo. Carriage of Preference Cargo, 13 S.R.R. 44 (M.S.B., 1972). It is therefore certain that the nature of cargo carried is material and respondents' simplistic reference to "services", "route", or "line" should not be considered.

(b) Respondents next argue that the failure of the 1936 Act to expressly exclude subsidized vessels from carriage of preference cargo implies a congressional intent to permit such action. This argument is a double-edged sword for it could

fairly be inquired whether there is a single word within the statute expressly granting the right of a subsidized carrier to earn subsidy for carriage of preference cargo. The answer is, of course, no.

2. Administrative Construction.

Respondents contend that there has been a long, consistent administrative construction of this issue and that such interpretation now has the force of law. If this were so, why is it that the hearing examiner ruled squarely against respondents' contentions here and the Commission, recognizing the patent abuses, compelled partial abatement of subsidy?

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

SOUTHER, SPAULDING, KINSEY,
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